Supreme Court, U. S.
FILED
DEC 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-933

LAWRENCE T. WESTERVELT,
Petitioner,

v.

CENTRAL ILLINOIS PUBLIC SERVICE CO.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Illinois

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December 28, 1977

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CENTRAL ILLINOIS PUBLIC SERVICE CO.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Illinois

The petitioner, Lawrence T. Westervelt, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Illinois rendered in these proceedings October 3, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 67 Ill. 2d 207 and 367 N.E. 2d 661. It is set forth in Appendix A. The memo of denial of rehearing is set forth in Appendix B.

The opinion of the Appellate Court of Illinois, Third Judicial District is reported at 35 Ill. App. 2d 777, and 342 N.E. 2d 463. It is set forth in Appendix C.

The opinion of the Circuit Court of the Ninth Judicial Circuit of Illinois, McDonough County, is not officially reported. It is set forth in Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The judgment of the Supreme Court of Illinois was entered May 20, 1977. A timely petition for rehearing was denied October 3, 1977 and this petition for certiorari is timely filed within 90 days from the denial of rehearing.

The question presented in this petition was preserved for this Court by presenting it to the Illinois Circuit Court, Appendix D, E and F *infra*, to the Appellate Court of the Third Judicial District of Illinois, Appendix G and H, *infra*, and to the Supreme Court of Illinois, Appendix I, *infra*.

QUESTION PRESENTED

Whether the command of the Fifth Amendment of the Constitution of the United States, that private property shall not be taken for public use without just compensation, made obligatory on the States by the Fourteenth Amendment of the Constitution of the United States, confers on a condemnee a constitutional right to recover attorney fees from the condemnor for a mistrial resulting from error injected into the proceeding by the condemnor.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

"No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." Constitution of the United States, Amendment XIV, Section 1:

". . . nor shall any state deprive any person of . . . property, without due process of law . . ."

STATEMENT OF CASE

The matters material to consideration of the question presented by this petition involve rulings of the trial and reviewing courts and very few evidentiary facts, and therefore may be introduced to the Court in summary fashion.

On June 29, 1972 Central Illinois Public Service Company (CIPS) filed in the Circuit Court of McDonough County, Illinois a petition to acquire an easement to construct, operate, and maintain a high voltage electric transmission line across land owned by the petitioner, Lawrence T. Westervelt, lying between Macomb and Colchester.

CIPS is a public utility within the meaning of Illinois Law and was awarded the authority of the State of Illinois to exercise the power of eminent domain in this proceeding.

The case was tried before a jury, which awarded petitioner a verdict finding compensation for the easement. A post-trial motion requesting a new trial was filed by petitioner. A mistrial was declared due to improper evidence and argument of CIPS. Thereafter, a second trial was conducted. After the second trial petitioner presented a petition for attorney fees to the trial court asking the court to require CIPS to pay petitioners attorneys fees for the first trial. Appendix E, infra. The petition

for attorney fees was supported with a brief setting forth petitioners claim that the guarantee of just compensation of Amendment V of the U.S. Constitution and other authority required an award of attorney fees. Appendix F, infra.

The petitioner's claim for attorney fees was denied by the Circuit Court of the Ninth Judicial Circuit, McDonough County, Illinois. Appendix D, infra.

Petitioner's claim for attorney fees for the first trial was presented as an issue to be decided by the Appellate Court of the State of Illinois, Third Judicial District, on direct appeal, along with other issues from the second trial by including it as an issue in the brief, and presenting argument and authority thereon in the brief. Appendix G and H, infra. The Circuit Court's denial of attorney fees for the first trial was affirmed by the Appellate Court. Appendix C, infra, pp. A-7-A-13, at p. A-13.

However, the Appellate Court reversed on other grounds raised by petitioner and remanded the cause for a third trial. Thereafter, CIPS petitioned for leave to appeal to the Illinois Supreme Court as to the reversal, and its petition was granted.

Petitioner's claim for attorney's fees was presented by way of cross appeal to the Illinois Supreme Court and again included in the issues presented to the court and in the argument. Appendix I, infra. The Supreme Court affirmed the Appellate Court, both as to the reversal and remand petitioner had requested, and as to the denial of petitioner's attorney fees for the first trial. The decision of the Supreme Court of Illinois refusing petitioner's claim for attorney fees for the first trial is final and will be the law of the case as to that issue on the remand. Appendix A, infra, pp. A-1-A-5 at p. A-5.

Petitioner's conclusion that the mistrial was in fact declared due to improper evidence and argument by CIPS was set forth

in petitioner's original fact summary in the Appellate Court of Illinois and has never been controverted by CIPS in the reviewing courts. Extracts of the rebuttal argument made by CIPS at the end of its final argument to the jury in the first trial, and the trial judge's comments on the improper evidence, prior to ruling on the post-trial motion, are set forth in Appendix J and H hereof and do not require further comment. Petitioner raised his constitutional claim by the petition for attorney's fees, brief and argument at the trial level, and persisted in that claim throughout the reviewing courts to this court.

The denial of petitioner's constitutional claim by the Appellate Court of Illinois and the Supreme Court of Illinois appears to be without comment. Appendix C, infra, pp. A-7-A-13 and Appendix A, infra, pp. A-1-A-5.

That the requirement of just compensation of the Fifth Amendment of the Constitution applies to this proceeding by the effect of the Fourteenth Amendment of the Constitution has never been challenged in this case. In *Gideon v. Wainwright*, 372 U.S. 339 at 341-342, 83 S.Ct. 792 at 795 (1963), this court stated "In many cases . . ., this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States . . . the Court has made obligatory on the States the Fifth Amendment's command that private property shall not be taken for public use without just compensation . . ." From this language in *Gideon*, approving and explaining the action of this Court in *Chicago, B & Q. R. Co. v. Chicago*, 166 U.S. 226, 235-241. 17 S.Ct. 581, 584-586 (1897), and *Smyth v. Ames*, 169 U.S. 466, 522-526, 18 S.Ct. 418, 424-426 (1898), it is clear that the application of the Fifth Amendment requirement of just compensation to the States is a fundamental proposition of constitutional, not an issue in this case.

REASONS FOR GRANTING THE WRIT

1. **The Right Claimed Under the Constitution in the Novel Question Presented Herein Has Not Heretofore Been Before This Court.**

The basic question in this case would not seem to have ever come before this Court.

A prior case which suggests that a general claim for attorney fees is not embraced within just compensation is *Dohany v. Rogers*, 281 U.S. 362, at 368, 50 S.Ct. 299, at 320 (1929). *Dohany* appears to present a claim on a classification theory of equal protection. It does not appear to deal with a Fifth Amendment claim of attorney fees due to a mistrial caused by a condemnor.

2. **The Error Injected Into the Proceeding by the Condemnor Is Flagrant.**

Petitioner considers a fair characterization of the conduct of the condemnor as flagrant. The remarks in argument, and evidence presented by experienced counsel are so clearly improper as to allow petitioner to conclude an ascertainable strategy to improperly and significantly reduce the verdict of the jury. An extract of the argument is set forth in Appendix J, *infra*, and the trial court's comment on the improper evidence is set forth at Appendix K, *infra*.

3. **The Condemnors Strategy Is Fundamentally Unfair.**

If this Court is convinced, as is the petitioner, of the strategy of the condemnor, to utilize any necessary tactic to reduce the verdict, fairness requires a remedy.

The fact that the argument and evidence were both presented in rebuttal is convincing as to the strategy.

The financial strength of a utility renders it quite able to afford to litigate at the expense of the generally less able landowner. Apparently the expense of risking continued litigation may have been less than the expense of risking a verdict free from error. This analysis emphasizes the need for constitutional protection to the petitioner and others similarly situated from the abuse of the system of fairly determining such suits.

4. **Impact to Consumers**

The public utility condemnor has the ability to pass its litigation expense to the consuming public. The effect of protracted litigation, largely unnecessary, as herein observed, has the single effect of increasing consumer costs where fair compensation is, at great length and expense, ultimately assessed.

Ever increasing population and population concentration in the country will require increasing use of public land and can certainly intensify the problem stated herein.

5. **The Constitutional Question Herein Is Important to the Administration of Justice.**

The remedy petitioner requests is the only technique for protecting a landowner from the type of abuse illustrated by this case. Imposition of attorney fees in such situations should prevent their occurrence. The quality of justice afforded will thereby increase. Certainly judicial efficiency would be enhanced by avoiding unnecessary litigation at all levels.

6. **Just Compensation Turns on Equitable Principles the Purpose of Which Are to Make the Landowner Whole and Compensate Him Fully.**

This Court has indicated that just compensation is determined by equitable principles and its full measure varies with the facts. *Seaboard Air Line R. Co. v. United States,* 261 U.S. 299, 43 S.Ct. 354, 17 L.ed. 664 ( ).

Further, this Court has indicated that the value at the time of the taking, plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking is the just compensation impliedly promised in the taking of property. *United States v. Klamath & M. Tribes,* 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219 (1938).

7. **Logical Extension of Equitable Principles Generally Considered Applicable in Determining Just Compensation Results in a Conflict With the American Rule Precluding Attorney Fees in Most Situations.**

The general rule as to recovery of attorney fees in litigation in this country is stated at 20 C.J.S. Section 218, page 455 where the rule is recited as "Outside of exceptional cases in courts of equity, attorney's fees are allowable or taxable as costs only by virtue of express authority conferred by statute, agreement, or stipulation." When this rule is tested against the equitable principles upon which just compensation is determined, it is clear that the effect is to leave the landowner less than whole. The landowner is brought to the court involuntarily by the power of the state, and is left to litigate endlessly with a public utility at his own expense. We accept without compunction imposition of the expense of attorney fees for defense of the indigent, upon the public, and rightly so, and equally without compunction

leave the landowner to his own devices, subject to the tactics and strategies of the "public" utility to which we have awarded and entrusted the power of the state to take private property.

Surely, this is a case where there are exceptional circumstances requiring that the equitable rule prevail.

8. **The Supreme Court of Florida Has Ruled That Attorney Fees Should Be Awarded in a Situation Quite Similar to This Case.**

In 1959 the Supreme Court of Florida ruled, in what your petitioner considers an enlightened opinion, that under the provisions requiring "full" and "just" compensation in the Florida Constitution, attorney fees should be awarded to the condemnee for successful defense of an appeal prosecuted by the condemnor.

The comments of Mr. Justice Hobson, concurred in by Mr. Justice Terrell and Mr. Justice Roberts are worthy of reciting here:

> "This court is committed to the doctrine that attorney's fees may be awarded only in cases where statute or special contract provides for them. This is the general rule applicable in cases involving private litigation. . . . Without, as we now feel, appropriate consideration of the distinct nature of eminent domain proceedings and the stark significance of the requirements of "full" and "just" compensation, this rule was applied to such proceedings. . . . However, it is our opinion that an exception should be made to the general rule in those cases wherein appellees are successful in defending appeals prosecuted by the condemning authority.
>
> We believe such an exception is in keeping with the spirit and letter of our constitutional provision for full or just compensation. . . .

> Failure to recognize such an exception in a case like the instant suit would fall far short of 'a practical attempt to make the owner whole.' Henry G. DuPree Company is not here of its own free will. Jacksonville Expressway Authority instituted this appeal thus compelling the condemnee to employ counsel and become obligated for a reasonable attorney's fee. If the condemnee is required to pay such fee out of its own funds there can be no doubt that the outlay would bear a reasonable relationship to the loss occasioned the owner by virtue of the taking of (its) property under the power of eminent domain." *Jacksonville Expressway Authority v. Henry G. DuPree Company*, 108 So.2d 289 at 294 (1959).

Petitioner has asked only for attorney fees for the first trial which ended in mis-trial at the instance of the condemnor. Only that question has been preserved for this Court. Since that first mistrial, condemnee has successfully appealed to the Appellate Court and obtained a reversal of the second trial, and successfully defended that reversal in the Illinois Supreme Court.

In petitioner's view, there is little distinction between the mis-trial in this case, and the situation in the *DuPree* case before the Florida Court.

CONCLUSION

For the reasons stated, this case raises a question of special importance and the petition for certiorari should be granted.

Respectfully submitted,

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608 Wabash
Carthage, Illinois 62321
Counsel for Petitioner

APPENDIX

APPENDIX A

Central Illinois Public Service Company,
Appellant,

v.

Lawrence T. Westervelt,
Appellee.

No. 48356

Supreme Court of Illinois

May 20, 1977

Rehearing Denied October 3, 1977

Harris & Harris, Macomb, and Nafziger & Otten, Springfield (William R. Harris, Macomb, and Elmer Nafziger, Springfield, of counsel), for appellant.

Hartzell, Glidden & Tucker, Carthage (Franklin M. Hartzell, and Stanley L. Tucker, Carthage, of counsel), for appellee.

Clark, Justice:

This controversy concerns the propriety of the evidentiary consideration of the unsightliness of a utility line and its effect on the market value of land as a properly compensable element of damages in an eminent domain action.

Plaintiff, Central Illinois Public Service Company (CIPS), filed a petition on June 29, 1972, in the circuit court of McDonough County to acquire, by eminent domain, 13 parcels of real estate as a right-of-way for the construction, operation and

maintenance of a 138-kilovolt multigrounded transmission line. Two of the parcels were involved in the trial of this case but only one parcel, which the defendant, Lawrence T. Westervelt, owns, is involved in this appeal.

When CIPS instituted the eminent domain action to acquire the perpetual easement to construct and to operate and maintain the high voltage electric transmission line across land owned by Westervelt, the latter filed a cross-petition claiming damage to the remainder of his property not within the easement strip. CIPS denied any damage alleged in the cross-petition. The jury returned a verdict giving Westervelt $3 for that portion of the easement strip to be occupied by the structures; $8,187.70 for the remaining portion of the easement strip; and nothing for Westervelt's property outside the easement strip. Westervelt filed a post-trial motion on January 18, 1973, that requested a new trial. Over a year later a mistrial was declared.

A second jury trial was held on April 29, 1974, and the jury returned a verdict awarding Westervelt $6.60 for damage to that portion of the easement strip to be occupied by structures; $3,780 for the remainder of the easement strip; and $8,750 for damage to land outside the easement. In the course of this trial, the court barred Westervelt's evidence as to the unsightliness of the proposed improvement, *i.e.*, the description of the structure and the appearance of the line. The court maintained that the unsightly appearance of the line is not a proper element to be considered because it is speculative and uncertain in nature when determining damages or reduction in the market value of the property. Judgment was entered upon the verdict of the jury and Westervelt appealed.

The appellate court (*Central Illinois Public Service Co. v. Westervelt* (1976), 35 Ill.App.3d 777, 342 N.E.2d 463), found that the trial court's refusal to admit evidence of the unsightliness of the structures to be constructed by CIPS, as an element of

damage, was error; it then reversed and remanded the cause for a new trial. Also the appellate court, holding that Westervelt did not fall within the applicable statutory provision for attorney fees in an eminent domain action (Ill.Rev.Stat. 1973, ch. 47, par. 10), found no merit in his claim for attorney fees for the first trial because a mistrial had been granted.

The issue here is whether evidence of unsightliness of a utility line and its effect on the market value of land not taken should be propertly considered as a compensable element in an eminent domain action. The record shows that the land owned by Westervelt, the one parcel at issue, is a semiwooded area of 240 acres lying between two roads, one on the east and one on the west. On the east road there are numerous homes. On the west road numerous small tracts have been sold for homesites. The area is a popular residential area because of its natural beauty, due largely to an abundance of trees, and because of its proximity to Macomb, Illinois. The homesites, within the region of the Westervelt property, vary from one to five acres and are occupied by university employees or others who work in McDonough County.

In *Board of Trade Telegraph Co. v. Darst* (1901), 192 Ill. 47, 61 N.E. 398, this court recognized unsightliness as a *bona fide* element of damage to the value of property in eminent domain suits. Later, in *County Board of School Trustees v. Elliott* (1958), 14 Ill.2d 440, 446, 152 N.E.2d 873, the court noted that physical disturbances need not be tangible but need only be a disturbance of a right enjoyed in connection with the property. It was also said in *Illinois Iowa Power Co. v. Rhein* (1938), 369 Ill. 584, 596, 17 N.E.2d 582, 588:

> " 'The physical disturbance of a right which a landowner enjoys in connection with his property,' as defined by this court, does not mean that it is confined entirely to the location of a physical structure, but if a 'right to enjoy' it is

disturbed by physical means consisting of structures or actual taking, or by originating results directly affecting the land not taken, proof of such disturbance and the resulting damages may be shown by the landowners. This court has not restricted the proof of damages to lands within the easement."

This court has considered proper evidence of damages for an unsightly spoil bank, the waste material from excavations, where the unsightliness was injurious to the property *not* taken by eminent domain and the aesthetic detriment was shown to have reduced the market value of the property. (*Sanitary District v. Baumbach* (1915), 270 Ill. 128, 110 N.E. 331.) In *Baumbach*, testimony that spoil banks would detrimentally affect the sale of lands not taken, but to be used for residential purposes, was held admissible.

"That a high and unsightly spoil bank located so near the property not taken in both tracts would injure the sale of these tracts if subdivided for residence and business purposes is apparent, hence it was proper for the witnesses to take the spoil banks into consideration in estimating the damages to land not taken. The extent to which the land not taken would be injured by the construction of the canal in the manner disclosed by the proof *is largely a matter of opinion*, and was a proper subject upon which to take the testimony of witnesses whose experience *qualified* them to express such an opinion.

* * * [I]f the spoil banks operated to obstruct the view and obstruct light and air from any portion of the lands not taken of either tract it was proper to prove this as an element of damages." (Emphasis added.) *Sanitary Districe v. Baumbach* (1915), 270 Ill. 128, 133-34, 110 N.E. 331, 333.

In assessing damages the jury is empowered to determine the "highest and best use" of the land. (*Sanitary District v. Baumbach* (1915), 270 Ill. 128, 132, 110 N.E. 331.) In this case there is clear evidence that the highest and best use of the Westervelt land is for residential homesites. Therefore, it is not controlling that the structures, to be built on the easement strip, are unsightly to Westervelt. Rather, as the appellate court found, it is the effect of the unsightliness on prospective buyers of residential lots which is relevant. If the construction on the easement strip is aesthetically distasteful or unsightly to potential buyers, the market value of the land is thereby reduced. The nature of the construction in this case—a 138-kilovolt multiground transmission line—damages the market value of a potential residental area.

For these reasons we hold that the appellate court was correct in its conclusion that the trial court's refusal to admit evidence of unsightliness of the structures to be constructed by CIPS as an element of damage was in error.

We find further that the appellate court correctly concluded that the defendant is not entitled to attorney fees because he did not fall under the provisions for attorney fees in an eminent domain action. Ill.Rev.Stat. 1973, ch. 47, par. 10.

Therefore, the judgment of the appellate court is affirmed.

Judgment affirmed.

APPENDIX B

(Seal)
State of Illinois
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Clerk

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October 3, 1977

Hartzell, Glidden & Tucker
Attorneys at Law
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Carthage, Illinois 62321

No. 48356—Central Illinois Public Service Company, appellant vs. Lawrence T. Westervelt, appellee. Appeal, Appellate Court, Third District.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause. The first page of the opinion was modified upon denial of petition for rehearing, and a copy of said page as modfied upon denial of petition for rehearing, and a copy of said page as modified is enclosed.

Very truly yours,

CLELL L. WOODS
Clerk of the Supreme Court

APPENDIX C

35 Ill.App.3d 777

Central Illinois Public Service Company,
Plaintiff-Appellee,

v.

Lawrence T. Westervelt,
Defendant-Appellant.

No. 74-336.

Appellate Court of Illinois,
Third District.

February 6, 1976.

Stanley L. Tucker, Hartzell, Glidden & Tucker, Carthage, for defendant-appellant.

Harris & Harris, Macomb, Elmer Nafziger, Nafziger & Otten, Springfield, for plaintiff-appellee.

Barry, Justice.

Central Illinois Public Service Company, hereafter referred to as CIPS, instituted an eminent domain action in the Circuit Court of McDonough County to acquire a perpetual easement to construct, operate, and maintain a high voltage electric transmission line across land owed by the defendant-appellant, Lawrence T. Westervelt. Westervelt filed a cross-petition which claimed damage to the remainder of his property not within the easement strip. CIPS denied any of the damages alleged in the cross-petition. The case was tried before a jury and a ver-

dict was returned finding just compensation for the land taken to be $3.00, and for the land not taken but within the easement strip to be $8,187.70, and no damage for land outside the easement strip. Westervelt filed a post-trial motion on January 18, 1973 that requested a new trial. On January 29, 1974, the trial judge (Francis P. Murphy) declared a mistrial because CIPS had presented both improper evidence and argument. Westervelt moved that the court grant him attorney fees for the first trial and his motion was denied.

A second trial was held before a jury on April 29, 1974. At the conclusion of this second trial the jury again returned a verdict for the defendant, Westervelt, finding just compensation for damage to the land taken to be $6.60, just compensation for damage to the land not taken outside the easement strip to be $8,750, and just compensation for land within the easement strip but not taken to be $3,780. Judgment was entered upon the verdict of the jury and Westervelt now brings this appeal.

Westervelt presents four issues for review claiming the trial court committed reversible error by: 1) Denying his motion for change of venue to a county other than McDonough or denying his request to have CIPS produce a list of customers or denying his challenge to the entire venire; 2) Excluding defendant's photographic exhibits 1-9 from evidence; 3) Prospectively prohibiting introduction of evidence pertaining to unsightliness of the proposed structures upon the easement strip and their effect on the fair market value of the land not taken and in refusing to admit the land not taken and in refusing to admit the testimony and offer of proof of certain of defendant's witnesses pertaining to said matters; 4) Denying defendant's petition for attorney's fees because CIPS caused the mistrial to be declared at the conclusion of the first trial.

Before the second trial began on April 29, 1974, several relevant motions were filed and argued by both sides. On

February 20, 1974, CIPS filed a motion for change of venue which was styled a supplemental motion for change of venue. That motion requested that the cause be tried before some judge other than Francis P. Murphy. At the conclusion of the hearing of February 26, 1974 of CIP's said supplemental motion for change of venue, which was contested by Westervelt, the motion was denied and an appropriate order was entered on March 14, 1974. Also on February 26, 1974 Westervelt filed a motion for change of venue to some county other than McDonough because the defendant feared the inhabitants of McDonough County were prejudiced against him and that CIPS had an undue influence over the inhabitants, a great many of whom were customers of CIPS. This motion by Westervelt was not verified nor supported by affidavits as required by statute. Westervelt's said motion for change of venue filed on February 26, 1974 and CIPS motion to strike the same came on for hearing on April 3, 1974. The trial court granted CIPS's motion to dismiss the Westervelt motion for change of venue but granted Westervelt leave to file a second motion for change of venue instanter. The second motion was verified and supported by affidavits. Evidence was presented showing the physical area served by CIPS and that 13,887 customers were served in McDonough County. After arguments from both parties were heard, Westervelt's second motion for change of venue was denied. We believe that where the basis of a petition for a change of venue is the alleged prejudice of the inhabitants of the county or the undue influence of the adverse party over their minds, the granting or denying of the petition rests in the discretion of the court, (Ill.Rev.Stat. ch. 146 § 4 (1973)); that the trial judge's determination should not be disturbed unless there is an abuse of discretion, *Gouker v. Winnebago County Board of Supervisors*, 37 Ill.2d 473, 228 N.E.2d 881 (1967). Westervelt's second motion (petition) was based upon opinion of the pleader, and as it appears the allowing of extensive voir dire questioning and the granting of a motion in limine helped eliminate the possibility of preju-

dice that was alleged in the petition, we find the trial judge did not abuse his discretion in denying the petition for change of venue.

Westervelt challenged the entire venire prior to the jury being sworn, for the reason that he believed all of the panel were customers of CIPS or customers of someone supplied by CIPS. The challenge was supported by Westervelt's affidavit which set out that he believed the jury included customers, stockholders or employees or members of the family of the same of CIPS. A request was also made that CIPS produce a list of customers, employees and stockholders. The court granted the request as to CIPS stockholders and employees but would not require the production of a customer list and denied the challenge of the entire venire. From studying the relevant portions of the record we conclude that the trial judge did not err in denying the challenge to the venire or the request for production of a customer list. Each prospective juror was questioned extensively on voir dire in an effort to uncover any prejudice for or against CIPS. Several jurors were dismissed for cause when their answers to questions revealed that they were employees of CIPS or close acquaintances of employees or were stockholders of CIPS or related to stockholders. Each juror was asked if he could impartially consider the evidence as it was presented and the instructions of the court and render his verdict based thereon. The question was asked whether the prospective jurors had any feeling or whether they would tend to lean to one side or the other in this case. They responded in the negative. Specifically the question was asked of one juror, "No feeling of the fact that Central Illinois Public Service Compeny produces electricity and transmits the same?" The response was "No". The answers given by the jurors finally accepted by both sides during voir dire examination were under oath and none indicated any prejudice against Westervelt or in favor of CIPS. We feel the trial judge acted without error in denying both the challenge to the entire venire and the request to produce a list of CIPS customers.

The defendant next contends that error occurred in the trial court's refusal to admit his photographic exhibits 1-9 into evidence. All of those exhibits are pictures of rural residences in the vicinity of defendant's property. They were offered to suggest to the jury the possibility of erecting like structures on Westervelt's property as the highest and best use of his land. Westervelt urges that these exhibits were critical to his attempt to show that the highest and best use of his land is for rural residential homesites. Several valuation witnesses testified to this as the highest and best use of defendant's property. The jury viewed the scene. While it is true that photographs which illustrate the subject matter of testimony may be received into evidence for the purpose of showing a particular situation, explaining the testimony or enabling the jury to apply the testimony more intelligently to the facts shown (see Righeimer, *Eminent Domain in Illinois*, Section 5.052, page 104, 2nd Edition), the admission into evidence is within the discretion of the trial court and it is a proper exercise of such discretion to refuse to admit the photographs where the jury has viewed the premises. (*Dept. of Public Works and Buildings v. Chicago Title and Trust Company*, 408 Ill. 41, 95 N.E.2d 903 (1951)). The viewing of the premises by the jury in the instant case cured any alleged prejudice resulting from the trial court's refusal to admit defendant's photographic exhibits 1-9 into evidence.

Westervelt next contends that the verdict of the jury in this case should be reversed because that verdict was the result of a clear and palpable error due to the trial court's prospective ruling that evidence as to the unsightliness of the improvements to be constructed by CIPS on the easement strip was inadmissible. We are inclined to agree with defendant's contention and believe that the error prejudiced and misled the jury. In the instant case Westervelt sought to prove damage to the remainder of his land not taken by CIPS because the highest and best use of said land was for rural residential homesits. He claimed the

presence of high voltage electric transmission line and supporting structures was unsightly and unattractive and would reduce the market value of his land not taken because the public would be less willing to buy residential tracts there. We disagree with CIPS reasoning that unsightliness is not a proper element to be considered in determining the damage to property in an eminent domain action. In *Central Illinois Light Co. v. Porter*, 96 Ill.App.2d 338, 239 N.E.2d 298 (1958), we held that where an electric transmission line ran across property useful only for duck hunting purposes the unattractiveness of the structures to wild ducks which caused them to cease using the property was a proper element of damage to be considered by the jury in awarding damages to remainder of a defendant's property not takn in an eminent domain action. We are also aware of *Board of Trade Telegraph v. Darst*, 192 Ill. 47, 61 N.E. 398, 399 (1901), where the Illinois Supreme Court said in speaking of the damage to land not taken for purposes of constructing a telegraph line: "We have no doubt, as a proper element of damage, it was competent to prove nearness to his residence and the unsightliness of the poles or structure." The *Darst* case has been criticized by the cases of *City of Winchester v. Ring*, 312 Ill. 544, 144 N.E. 333 (1924); *Illinois Power Co. v. Wieland*, 324 Ill. 411, 155 N.E. 272 (1927), and *Central Illinois Light Co. v. Nierstheimer*, 26 Ill.2d 136, 185 N.E.2d 841 (1962). In those cases the language used by the court was to the effect that unsightliness should not be considered in awarding damage for land not taken in an eminent domain action. In the context of those decisions that language in each was dicta and the holdings in fact were based on other reasons such as non-recognition of the fact that a cemetery offended the sensibilities of the individual landowner in the *Ring* case, or where continuity damage from the poles was speculative as in the *Wieland* case. or the lack of danger from power lines and towers in the *Nierstheimer* case.*

The fact that the structures in the case at bar was unsightly to Westervelt is not controlling. Defendant made an offer of

proof to the court by expert real estate appraisers that the structure CIPS proposed to construct would be unsightly to the public and thereby reduce the value of the land to purchasers who would be willing to pay less than what Westervelt's land was worth before the taking. The reasoning applied in *Central Illinois Light Co. v. Porter, supra*, is applicable here and will be followed.

The rule consistently applied in Illinois is that where the testimony as to values is in conflict, the jury has viewed the premises, and the verdict is within the range of the testimony, the award will not be disturbed on review unless there is something in the record showing that the verdict was a clear and palpable mistake or the result of passion and prejudice or that there was some erroneous ruling that might have misled the jury. (*Department of Public Works and Buildings v. Oberlaender*, 92 Ill.App.2d 174, 235 N.E.2d 3 (1968)). We believe the trial court's prospective ruling and refusal to admit evidence of unsightliness of the structures to be constructed by CIPS as an element of damage was error and misled the jury. For that reason the cause must be reversed and remanded for a new trial.

We find no merit in defendant's claim for attorney fees for the first trial because a mistrial was granted. Defendant does not fall within the applicable statutory provision for attorney fees in an eminent domain action, see Ill.Rev.Stat. 1973, ch. 47 §10. Likewise, no agreement or stipulation between Westervelt and CIPS on which to base allowance of attorney fees to Westervelt has been shown.

For the foregoing reasons the judgment of the Circuit Court of McDonough County is reversed and the cause remanded for a new trial consistent with the views expressed herein.

Reversed and remanded for a new trial.

ALLOY and STOUDER, JJ., concur.

APPENDIX D

July 9, 1974

Harris & Nafziger
Attorneys for Petitioner
Hartzell, Glidden & Tucker
Attorneys for Defendants

Re: **Petition for Attorneys Fees**

Gentlemen:

It was my understanding at the time of the commencement of the trial on April 29, 1974, that the Petition for Attorneys Fees incurred by the Defendants at the first trial would be heard sometime after the conclusion of that trial. It was also my understanding, in discussing this with the attorneys, that briefs would be filed for the purpose of allowing the Court the opportunity to study any citations or authority concerning attorney fees prior to hearing any arguments in the case, as it was the Court's opinion that unless citations were cited, that the Court felt it was powerless to entertain a Petition for Attorneys Fees.

It was this Court's understanding that uopn the filing of written briefs the Court would consider this Petition only for the purpose of whether or not leave would be granted to file the Motion and for oral argument on the said Petition.

In considering the Motion for the attorneys fees, the Court has studied the various citations furnished to it by both Plaintiff and Defendant and, also, by its own examination, finds that there is no principle of the common law, nor case law, that attorneys fees and the expenses of litigation can be allowed to a successful party in the absence of a statute, agreement or stipulation spe-

cifically authorizing such. The determination of the Court in the Jacksonville Express Authority versus DuPree, Inc., is without precedence or authority in Illinois, and the Court, therefore, feels it does not have jurisdiction to allow such a Motion. A copy of a Draft Order denying the Motion is enclosed herein for your files.

Very truly yours,

/s/ LEWIS D. MURPHY
LEWIS D. MURPHY

In the Circuit Court of the Ninth Judicial Circuit of Illinois
McDonough County
General Division

Central Illinois Public Service Company, Petitioner, vs. Lozelle W. Mustard, et al., Defendants.	No. 72-G-155

Order

This cause coming on to be heard on Defendants, Lozelle Mustard, Clara Mustard, and Lawrence T. Westervelt, Petition for Attorneys Fees which were incurred in this cause at the first trial thereof conducted in December of 1972, and the Court, by stipulation of the parties' attorneys, agreed that Briefs would be filed in lieu of arguments for the Court's consideration in determining the propriety of setting a date certain for a hearing

on said Petition for Attorneys Fees. The Court, having examined said Briefs and being fully advised in the premises, finds that the Petition for Attorneys Fees is not based upon any statute, stipulation or agreement entered into by the parties hereof, and that this Court would be without jurisdiction to award the prayer of Petitioner. It is, therefore,

Ordered, that the Petition for Attorneys Fees will be, and the same is, hereby, denied.

Enter this 9th day of July, A. D. 1974.

/s/ LEWIS D. MURPHY
Judge

APPENDIX E

C 202

In the Circuit Court for the Ninth Judicial Circuit
of Illinois, McDonough County
General Division

Central Illinois Public Service Company, Petitioner, vs. Lozelle W. Mustard, et al., Defendants.	No. 72 G 155

Petition for Attorneys' Fees

Now comes Lawrence T. Westervelt, by Hartzell, Glidden & Tucker, his attorneys, and for a Petition for attorneys' fees, says:

1. That the above entitled cause is an eminent domain proceeding in which the Petitioner, Central Illinois Public Service Company, is attempting to condemn rights in certain lands of the Defendants.

2. That this cause came on for trial on the Petition of Central Illinois Public Service Company, and the cross petition of Lawrence T. Westervelt in December, 1972.

3. That at said trial Central Illinois Public Service Company presented certain evidence and certain argument over the objection of Lawrence T. Westervelt, all of which objectionable evidence and argument were thereafter specified and in a certain post-trial motion filed in this cause and thereafter this Court entered an Order finding that said post-trial motion should be

granted and that a mistrial should be declared and that Lawrence T. Westervelt should be granted a new trial and that the judgments entered against him should be vacated.

4. That Lawrence T. Westervelt has incurred attorneys' fees, witness fees and litigation expenses in appearing at said trial, and in obtaining a new trial and all of same are for naught

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and have been required as a result of the conduct of the Petitioner, Central Illinois Public Service Company, at the trial of this cause in December, 1972, as specifically set out in the post-trial motion of Lawrence T. Westervelt.

Wherefore, Lawrence T. Westervelt prays that this Court set a date certain for hearing on the above and foregoing Petition and then and there order the Petitioner, Central Illinois Public Service Company, to pay the attorneys' fees, court costs and litigation expenses incurred by Lawrence T. Westervelt at the trial of this cause heretofore heard on or about December, 1972, and the post-trial motion, subsequent thereto, and further grant to Lawrence T. Westervelt such other relief as the Court may deem proper.

LAWRENCE T. WESTERVELT
By HARTZELL, GLIDDEN and TUCKER
His Attorneys

HARTZELL, GLIDDEN & TUCKER
Attorneys for Lawrence T. Westervelt
Williams Building
Carthage, Illinois 62321
217-357-3121

APPENDIX F

C 226

In the Circuit Court
for the Ninth Judicial Circuit of Illinois
McDonough County, Illinois
General Division

Central Illinois Public Service Company,
Petitioner,
vs.
Lozelle W. Mustard, et al.,
Defendants.
No. 72-G-155.

Brief in Support of Petition for Attorneys' Fees of Defendants Lozelle Mustard, Clara Mustard, and Lawrence Westervelt

Defendants Lozelle Mustard, Clara Mustard, and Lawrence Westervelt have heretofore filed in this cause a "PETITION FOR ATTORNEYS' FEES" in which they ask the Court to order the Petitioner to pay certain attorney fees of said Defendants which were incurred in this cause, at the first trial thereof wherein certain error occurred, at the instance of the Petitioner, said first trial having been conducted in December, 1972, a new trial having been granted after filing of a post-trial motion for new trial by Defendants. The conduct, and evidence upon which error was predicated in the first trial are set out in the post-trial motions of these Defendants, which post-trial motions are hereby incorporated into this brief by reference.

Amendment V of the CONSTITUTION OF THE UNITED STATES provides in pertinent part "No person shall . . . be de-

prived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation."

Section 2 of Article I of the CONSTITUTION OF ILLINOIS 1970 provides "No person shall be deprived of . . . property without due process of law . . . ." and Section 15 provides "Private property shall not be taken or damaged for public use without just compensation as provided by law . . . ." and Section 12 provides "Every person shall find a certain remedy in the laws

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for *all injuries* and wrongs which he receives to his . . . property . . . . He shall obtain justice by law, freely *completely* and promptly," (Emphasis added.)

"Just compensation is determined by 'equitable principles' and its measure *varies with the facts.*" 27 Am Jur2d 266 EMINENT DOMAIN page 52 (Emphasis added.) Thus the Vth Amendment measure is applied in an equitable manner.

In Illinois the rules of valuation must put the landowner ". . . in as good a financial condition after the transfer as it was before." *Ill. Cities Water Co. v. Mt Vernon,* 11 Ill.2d 547, at 552 (1957).

Conclusion

Therefore, it seems to Defendants, that in order to do or obtain *complete* justice according to *equitable* principles, and place Defendants in as good a financial condition after the transfer as they were before it was made, then Petitioners must be required to pay Defendants attorney fees for the first trial and post-trial motion.

There is absolutely no question that had Petitioners engaged in the practices imposed on these Defendants by way of pleading rather than by argument or evidence, under Section 41 of Chapter 110, the Petitioner would be paying the attorney fees of the Defendants.

Defendants urge the Court to follow the thinking of *Jacksonville Expressway Authority v. Du Pree Co.,* 108 So. 2d 289 (1959) and hold that unusual facts and circumstances of the instant case require reimbursement for Defendants fees. Surely, there is little distinction between this situation and a dismissal of the petition, in which event defendants would be entitled to fees and expenses under Section 10 of Chapter 47.

LOZELLE MUSTARD, CLARA MUSTARD,
and LAWRENCE WESTERVELT
By HARTZELL GLIDDEN and TUCKER
Their Attorneys

APPENDIX G

Extract of Petitioner's Brief as Appellant in the Appellate Court of Illinois, Third Judicial District

Page 42

"IV. ATTORNEYS' FEES. Defendant's view of the first trial of this cause is that the mis-trial was granted because of improper and misleading evidence presented by petitioner, and improper and prejudicial remarks in the opening statement and final arguments of petitioner.

The major trust of our request for attorneys fees is the requirement of just compensation imposed upon the courts by the fifth amendment of the Constitution of the United States, and Sections 2 and 15 of Article I of the Constitution of Illinois, 1970, which will not be fully set out herein. (See statutes involved.) . . .

Page 44

We are very pleased with language we find in a Florida case, *Jacksonville Expressway Authority v. DuPree Co.*, 108 So. 2nd 289 (1959) at 294, where in an eminent domain proceeding that court stated:

> "This court is committed to the doctrine that attorneys fees may be awarded only in cases where statute or special contract provides for them. This is the general rule applicable in cases involving private litigation. (Cases cited) Without, as we now feel, appropriate consideration of the distinct nature of eminent domain proceedings and the stark significance of requirements of 'full' and 'just' compensation. This rule was applied to such proceedings. (Citing cases) However, it is our opinion that an exception

> should be made to the general rule in those cases where appellees in eminent domain proceedings are successful in defending appeals prosecuted by the condemning authority.
>
> We believe such an exception is in keeping with the spirit and letter of our constitutional provision for full or just compensation and with our decisions in the cases of (citing cases) and the opinion in the instant case.
>
> Failure to recognize such an exception in a case like the instant suit would fall far short of 'a practical attempt to make the owner whole.' Henry G. DuPree Company is not here of its own free will." at So. 2nd 294.

Although it is not clear to us, upon reading the opinion, whether the Florida court in that case granted attorneys' fees

Page 45

because of their constitutional thinking, or because of statutory provisions, we deem the logic set out by the court entirely appropriate to apply to this case . . .

Based upon this constitutional thinking there are a number of alternative concepts which the defendant would find acceptable in this case:

A. IN ALL CASES—

ATTORNEYS' FEES MUST BE ALLOWED:

1. In all condemnation cases because just compensation to the condemnee so requires, as a constitutional matter.

2. Where a new trial is granted on motion of the condemnee for any reason.

3. Where a new trial is granted on motion of the condemnee as a consequence of improper evidence, argument, or other matters provoked by the condemnor.

B. IN THE EVENT OF REVERSAL IN THIS CASE— ATTORNEYS' FEES MUST BE ALLOWED:

1. Where a condemnee is successful in obtaining a reversal and remandment on condemnee's appeal, for any reason.

2. Where a reversal or remandment is obtained by condemnee on appeal as a consequence of errors urged upon the court by the condemnor."

APPENDIX H

Extract of Petitioner's Reply Brief as Appellant in the Appellate Court of Illinois, Third Judicial District

page 14

"ATTORNEYS' FEES SHOULD BE ALLOWED IN THIS CASE. We most candidly agree that the common law general rule in Illinois prohibits attorneys' fees in this situation. We have not contended otherwise.

Our point is not what the law is, but what the law ought to or should be.

The common law general rule that attorneys' fees are recoverable only by Statute or contract, has not, to our knowledge, been tested against the constitutional principle of the Illinois and U. S. Constitutions, requiring just compensation. Our desire is that this Court face squarely the constitutional issue and make a determination as to whether, as a constitutional matter, just compensation requires the payment of attorneys' fees . . ."

APPENDIX I

Extract of Petitioner's Brief as Appellee, Cross-Appellant in the Supreme Court of Illinois

page 22

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page 23

knowledge, been tested against the constitutional principle of the Illinois and United States Constitutions, requiring just compensation. Our desire is that this Court face squarely the constitutional issue and make a determination as to whether, as a constitutional matter, just compensation requires the payment of attorneys' fees . . .

Westervelt's view of the first trial of this cause is that the mistrial was granted because of improper and misleading evidence presented by petitioner, and improper and prejudicial remarks in the opening statement and final argument of petitioner.

page 24

The major thrust of our request for attorneys' fees is the requirement of just compensation imposed upon the courts by

the fifth amendment of the Constitution of the United States, and Sections 2 and 15 of Article I of the Constitution of Illinois, 1970, which will not be fully set out herein. (See Constitutional Provisions involved.) . . .

page 25

Certainly just compensation is a matter to be established by equitable principles. 28 am jur 2nd 266, Eminent Domain, page 52.

We are impressed with language we find in a Florida case, *Jacksonville Expressway Authority v. DePree Co.*, 108 So. 2nd 289 (1959) at 294, where in an eminent domain proceeding that court stated:

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"This court is committed to the doctrine that attorneys fees may be awarded only in cases where statute or special contract provides for them. This is the general rule applicable in cases involving private litigation. (Cases cited) Without, as we now feel, appropriate consideration of the distinct nature of eminent domain proceedings and the stark significance of requirements of "full" and "just" compensation. This rule was applied to such proceedings. (Citing cases) However, it is our opinion that an exception should be made to the general rule in those cases where appellees in eminent domain proceedings are successful in defending appeals prosecuted by the condemning authority.

We believe such an exception is in keeping with the spirit and letter of our constitutional provision for full or just compensation and with our decisions in the cases of (citing cases) and the opinion in the instant case.

Failure to recognize such an exception in a case like the instant suit would fall far short of "a practical attempt to

make the owner whole." Henry G. DuPree Company is not here of its own free will." at So. 2nd 294.

Although it is not clear to us, upon reading the opinion, whether the Florida court in that case granted attorneys fees because of their constitutional thinking, or because of statutory provisions, we deem the logic set out by the court entirely appropriate to apply to this case . . .
page 27

Based upon this constitutional thinking there are a number of alternative concepts which Westervelt would find acceptable in this case:

A. IN ALL CASES—

ATTORNEYS' FEES MUST BE ALLOWED:

1. In all condemnation cases because just compensation to the condemnee so requires, as a constitutional matter.

2. Where a new trial is granted on motion of the condemnee for any reason.

3. Where a new trial is granted on motion of the condemnee as a consequence of improper evidence, argument, or other matters provoked by the condemnor.

B. IN THE EVENT OF REVERSAL IN THIS CASE—ATTORNEYS' FEES MUST BE ALLOWED:

1. Where a condemnee is successful in obtaining a reversal and remandment on condemnee's appeal, for any reason.

page 28

2. Where a reversal or remandment is obtained by condemnee on appeal as a consequence of errors urged upon the court by the condemnor."

———————

APPENDIX J

Extract of Improper Argument of CIPS in the Trial Court

page 92

Now, Mr. Soloman, yesterday, as I understand it, said that almost every road, along every road in this county was a possible residential site; and that property along the road had a special value. Well, first every farm has to have access to a highway, and every farm and every strip of land, every privately owned strip of land, has to have access to a highway. Now then, I don't know, but I imagine there are at least two highways in every mile you go over the state. That means to get electricity here from Grand Tower you have got to cross over 500 highways, and to get electricity here from Hudsonville, you would have to cross 500. I would say that's a minimum; probably more. To

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get here from Coffeen, you have to cross at least 300 highways. Just what is it going to cost the Central Illinois Public Service Company to build one of these transmission lines to get electricity here from these generating stations?

———————

APPENDIX K

Extract of Trial Court's Comments on Improper Evidence of CIPS in the Trial Court

Page 23

By the Court: "Mr. Nafziger, this is the thing that bothers me with the testimony, is that I don't remember Bruegge's testimony in detail, but it was, and I think is supposed to be

Page 24

testimony showing similar pieces of ground, similar land, something that is to compare with what is out here of town here; and over there, and that affidavit would indicate there isn't much of a similarity, is there, outside of a transmission line? . . .

By the Court: The thing that bothers me, and I might say this whole thing really didn't bother me too much, but I get a little bit concerned when I find people twisting, and I don't like it. I don't like it at all, and assuming that that affidavit is correct, then Bruegge deliberately mislead this jury. I haven't read his testimony. I got most of the way through it, and I skimmed his, because I didn't have time to read it all, but I don't remember it in detail. If he is saying these two properties are the same, what is the same? . . .

Page 26

By the Court: I don't think it is a fair comparison. I don't think it is a fact.

Page 28

By the Court: I am concerned about testimony which really is misleading, and I think that testimony was very misleading. I

think juries, I find them to be pretty conscientious and pretty smart and assume that officers of the Court, which we all are and they are, too, are only doing what is right. They assume it, but I think we all know it doesn't always happen. . . .

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I am concerned about improper testimony. Maybe that is not the right word, but it is testimony that would mislead.

Supreme Court, U. S.
FILED
JAN 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1977

No. 77-933

LAWRENCE T. WESTERVELT,
Petitioner,

vs.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1977

No. 77-933

LAWRENCE T. WESTERVELT,
Petitioner,

vs.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

THE PETITION DOES NOT PRESENT A FEDERAL QUESTION

Petitioner does not have a claim under the Fifth Amendment of the Constitution of the United States and has not shown the existence of any special or important reason for the granting of a Writ of Certiorari in this case.

STATEMENT OF THE CASE

Central Illinois Public Service Company (Central Illinois) is a corporation organized and existing under the Business

Corporation Act of the State of Illinois (Ill. Rev. Stat. 1975, Ch. 32, §§ 157.1-157.167) and is a public utility as defined by the Illinois Act entitled, "An Act concerning public utilities," approved June 29, 1921, as amended (Ill. Rev. Stat. 1975, ch. 111⅔, § 10.3). It was authorized by appropriate orders of the Illinois Commerce Commission (Ill. Rev. Stat. 1975, ch. 111⅔, §§ 50, 56, 63) to acquire by eminent domain an easement for the 138 KV multigrounded transmission line upon and across Petitioner's property. On June 29, 1972, pursuant to Section 2 of the Illinois Eminent Domain Act entitled, "An Act to provide for the exercise of the right of eminent domain," approved April 10, 1972 (Ill. Rev. Stat. 1975, Ch. 47, § 2), Central Illinois filed a petition in the Circuit Court of McDonough County, Illinois, to acquire by eminent domain an easement over 13 parcels of real estate including a parcel owned by Petitioner for the construction, operation and maintenance of a 138 KV multigrounded transmission line.

The case has been tried twice. Only two of the parcels, Petitioner's and one other were involved in the trials of the case. The first trial was held in December of 1972, in which judgment on the verdict was entered for Petitioner on December 21, 1972, for $8,190.70. A motion for a new trial was filed on January 18, 1973. The motion for a new trial was not granted by the Trial Court until January 29, 1974, more than one year later.

The alleged improper argument complained of by Petitioner set forth as Appendix "J" to the petition was acted upon by the Trial Court during the progress of the trial, Appendix "1". The alleged improper evidence was the testimony of Mr. Bruegge that the presence of a power line upon a 120 acre tract in DeWitt County did not affect the sale of that property. This testimony was offered and received without objection, Appendix "2". The comments of the Trial Court, Appendix "K" to

the petition, were prompted by an Affidavit of Joe Bianucci that a residence valued at $15,000 was located on the 120 acre tract in DeWitt County and ignored entirely the Affidavit of Frank A. Lamar, the purchaser of the 120 acre DeWitt County tract, that the power line did not in any way reduce the amount of his bid, Lamar Affidavit Appendix "3".

The second trial lasted from April 29, 1974, to and including May 4, 1974, and resulted in a verdict on the date last mentioned in favor of Petitioner in the amount of $12,536.60.

ARGUMENT

I

Attorneys' Fees Are Not Embraced Within Just Compensation in an Eminent Domain Proceeding.

This Court in *Dohany v. Rogers*, 281 U.S. 362, 368, 50 S. Ct. 299, 302, 74 L. ed 904, 911 (1929), held that

> "Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain."

The constitutional requirement of just compensation for the taking of land by eminent domain does not include attorneys' fees and expenses. *United States of America v. 4.18 acres of land, more or less, situate in Idaho County, State of Idaho and Scott Standard Harris, et al.*, U.S. Court of Appeals Ninth Circuit, 542 F. 2d 786, 788 (1976); *United States v. 2,353.28 acres of land, more or less, situate in the Counties of Brevard and Volusia, State of Florida, and Lucille M. Bair, et al.*, U.S. Court of Appeals Fifth Circuit, 414 F. 2d 965, 972 (1969); *In re Clark Estate. Brunstetter v. City of Miami*, U.S. Court of Appeals Fifth Circuit, 187 F. 2d 1003, 1005 (1951); *United States v. 15.3 acres of land, more or less, situate in the City of Scranton, County of Lackawanna and Commonwealth of Pennsylvania and Delaware Lackawanna and Western Railroad Co. et al.*, U.S. District Court M.D. Pennsylvania, 158 F. Supp. 122, 125 (1957); *United States of America v. 23.94 acres of land, more or less, situate in Floyd County, Commonwealth of Virginia and Foster E. Dalton, et al.*, U.S. District Court W.D. Virginia, 325 F. Supp. 330, 332 (1970); *United States v. 254.35 acres of land in Caddo Parrish Louisiana, et al.*, U.S. District Court W.D. Louisiana, 46 F. Supp. 913, 914 (1942).

The cases, *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 43 S. Ct. 354, 17 L. ed 664 and *United States v. Klamath & M. Tribes*, 304 U.S. 119, 58 S. Ct. 799, 82 L. ed 1219 (1938), cited by Petitioner, Page 8 of Petition, deal with the question whether interest under certain circumstances is includable as just compensation, and such cases are not applicable in this case. The Florida Supreme Court case, *Jacksonville Expressway Authority v. Henry G. DuPree Company*, 108 So. 2d 289, 294 (1959), cited by Petitioner, Page 10 of Petition, is not applicable in this case.

II

Illinois Law Does Not Authorize an Allowance for Attorneys' Fees in a Case Such as the One for Which a Writ of Certiorari Is Here Sought.

Central Illinois did not dismiss the petition or fail to make payment of full compensation within the time named in the Judgment Order. Also there has not been any final judgment that Central Illinois cannot acquire the property in question by condemnation. The relevant part of Section 10 of the Illinois Eminent Domain Act is as follows:

> "* * * If in such case the petitioner shall dismiss said petition before the entry of the order by the court first mentioned in this paragraph (a) or shall fail to make payment of full compensation within the time named in such order, or if the final judgment is that the petitioner cannot acquire the property by condemnation, such court or judge shall, upon application of the defendants to said petition or either of them, make such order in such cause for the payment by the petitioner of all costs, expenses and reasonable attorney fees of such defendant or defendants paid or incurred by such defendant or defendants in defense of said petition, as upon the hearing of such

application shall be right and just, and also for the payment of the taxable costs." (*Ill. Rev. Stat. 1975*, Ch. 47, § 10)

The rule in Illinois is that Attorneys' fees are not allowable to the successful party in the absence of a statute or in the absence of some agreement or stipulation especially authorizing the allowance thereof. In the case of *Ritter v. Ritter*, 381 Ill. 549, 553, 46 N.E. 2d 41, 43 (1943), the Supreme Court of Illinois stated:

> "The rule is also well established that attorney fees and the ordinary expenses and burdens of litigation are not allowable to the successful party in the absence of a statute, or in the absence of some agreement or stipulation specially authorizing the allowance thereof, and this rule applies equally in courts of law and in courts of equity. (*Constant v. Matteson*, supra; *Conwell v. McCowan*, supra; *Hutchison v. Hutchison*, supra; *Rasch v. Rasch*, 278 Ill. 261; *Kinane v. Fay*, 168 Atl. (N.J.) 724; *Weinhagen v. Hayes*, 190 N.W. (Wis.) 1002; *Day v. Woodworth*, 14 L. ed. 181.) Our statutes authorize the taxation of solicitor's fees as costs in partition cases but prior to the act authorizing it, the law was that they could not be so taxed. *Wilhite v. Pearce*, 47 Ill. 413; *Eimer v. Eimer*, id. 373; *Strawn v. Strawn*, 46 Ill. 412; *Campbell v. Campbell*, 63 id. 502."

In the case of *Trustees of Schools v. Schroeder*, 8 Ill. App. 3d 122, 125, 289 N.E. 2d 247, 250 (1972), the Appellate Court First District said:

> "* * * It does not support the proposition that in a suit to enjoin vexatious and harassing litigation, expenses, including attorneys' fees, can be recovered as elements of damages. This is so because under Illinois law, apart from sums allowable and taxed as costs, the expenses of trial preparation of litigation or expenditures for counsel fees, cannot

> be recovered as damages. (*Chicago Coliseum Club v. Dempsey*, 265 Ill. App. 542; *Boss v. Coe Investment Co.*, 45 Ill. App. 2d 417, 195 N.E. 2d 735; I.L.P. Damages, Section 62.) The assessing of attorneys' fees against the losing party in a litigation rests wholly on statutory or contractual authority. (*Ritter v. Ritter*, 381 Ill. 549, 553, 46 N.E. 2d 41.) In this State, there is no common law or equitable principle that allows attorneys' fees either as costs or as damages. (*People ex rel. Henderson v. Redfern*, 104 Ill. App. 2d 132, 243 N.E. 2d 252; *House of Vision, Inc. v. Hiyane*, 42 Ill. 2d 45, 245 N.E. 2d 468.) * * *"

In *Central Illinois Public Service Company v. Lawrence T. Westervelt*, Appendix "C", petition, the Appellate Court Third District of Illinois, 35 Ill. App. 3d 777, 782, 342 N.E. 2d 463, 468 (1976) stated:

> "We find no merit in defendant's claim for attorney fees for the first trial because a mistrial was granted. Defendant does not fall within the applicable statutory provisions for attorney fees in an eminent domain action, see Ill. Rev. Stat. 1973, ch. 47 § 10. Likewise, no agreement or stipulation between Westervelt and CIPS on which to base allowance of attorney fees to Westervelt has been shown."

In *Central Illinois Public Service Company v. Lawrence T. Westervelt*, Appendix "A", petition, the Supreme Court of Illinois 67 Ill. 2d 207, 213, 367 N.E. 2d 661, 663 (1977) said:

> "We find further that the appellate court correctly concluded that the defendant is not entitled to attorney fees because he did not fall under the provisions for attorney fees in an eminent domain action. Ill. Rev. Stat. 1973, ch. 47, par. 10."

III

The Constitutional Provisions With Respect to Just Compensation of the 1970 Constitution of Illinois and the Fifth Amendment of the U.S. Constitution Are Substantially the Same.

Section 2 of Article I of the 1970 Constitution of Illinois

> "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the law."

and Section 15 of said Article

> "Private property shall not be taken or damaged for public use without just compensation as provided by law * * *"

and the Fifth Amendment of the Constitution of the United States states that

> "No person shall * * * nor be deprived of life, liberty or property without due process of law nor shall private property be taken for public use without just compensation."

CONCLUSION

For the reasons given we respectfully submit that the Petition for a Writ of Certiorari should be denied.

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APPENDIX

APPENDIX "1"

Action by the Trial Court on Alleged Improper Argument

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THE COURT: Mr. Nafziger, I am not going to allow you to talk about hundreds of roads, and I heard no testimony throughout this trial; and you are talking about stations some place else that have nothing to do with this matter. I am not going to allow you to talk on that subject. You could extend it to Death Valley and South America, too, I suppose. It is not within the area of the trial. I think the jury is aware anyway, but let's keep it within the limit.

APPENDIX "2"

Excerpt of Bruegge Testimony

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Q. What investigation did you make, if any, to determine whether or not the existence of that power line upon the 120 acres affected the sale price of the property?

A. In my opinion it didn't.

Q. What investigation did you make to determine that fact?

A. This farm was divided and sold in three tracts, and the other two tracts did not have a power line on it, and the other two sold for the same per acre value as the 120.

Cross-Examination of Mr. Bruegge

By Mr. Stan Tucker

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Q. Mr. Bruegge, you referred to some land over at DeWitt County near Clinton, Illinois?

A. Yes, sir.

Q. Isn't it true that the land at DeWitt County is flat, prairie land, very good farm land?

A. Good agricultural land.

Q. Isn't it very flat, prairie land?

A. Flat.

Q. Drummer Flanagan soil for the most part?

A. That's right.

Q. Would you say that Clinton, Illinois, is similar in its characteristics to Macomb, Illinois?

A. As far as topography of the land?

Q. No, I mean the City of Clinton.

A. I don't quite understand your question.

Q. What do you know about the City of Clinton?

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A. It is the county seat of DeWitt County.

Q. What else do you know?

A. What am I supposed to know about it, Mr. Tucker?

Q. Let me ask you, do you know the population?

A. Yes, sir.

Q. What is it?

A. Around 7,500.

Q. That's substantially smaller than Macomb?

A. Yes, sir.

Q. Do you know whether or not there is a college or university there?

A. No, there isn't.

Q. You don't know, or there isn't?

A. There isn't.

Q. There is not. When you go north out of Clinton on the highway there, and you pass the DeWitt County historical building, and you go north, what is the next town you go to?

A. Wapella.

Q. About how far is Wapella?

A. I would have to say four to five miles. I really don't know right off hand.

Q. That's right, it is about four to five miles, and the property is four to five miles northwest. Now Hayworth would be next up the road north, and that would be about 11 miles?

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A. I would imagine so.

Q. I beg your pardon?

A. I would imagine so, yes, sir.

Q. And the property you are referring to would probably be west of Wapella out in the country there, right?

A. About a mile and a half west of Wapella.

Q. Wapella is a very small place, isn't it?

A. That's correct.

Q. You have testified that you were experienced in appraising, and that you were familiar here, of course, earlier I believe you testified that you had never appraised in McDonough County before. Let me ask you with regard to the Westervelt property, you didn't know what the number of staff there were at Western Illinois University, did you?

A. The number of staff, personnel?

Q. Yes.

A. No, sir, I do not.

Q. And as I recall, you also didn't know that Professor Fox had purchased two tracts of four acres each from Mr. Westervelt for $1,500 an acre. In fact, I believe you stated that you thought they were for $750 an acre, isn't that right?

A. Yes, but I really didn't need anything that size, because my properties weren't in that size category.

Q. You checked that sale, didn't you?

A. I looked it up is all.

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Q. You looked it up and made a mistake, and as my final question, I would like to ask you if you were as careful in checking the sales you referred to about properties where power lines were as you were careful in checking this Fox sale?

A. More so, sir.

MR. TUCKER: Thank you, Mr. Bruegge.

APPENDIX "3"

Affidavit of Frank A. Lamar

C-156-157

State of Illinois }
County of DeWitt } ss.

FRANK A. LAMAR, being first duly sworn, deposes and says that he is a resident of the State and County aforesaid.

Affiant further deposes and says that:

1. He was a relative of Leo N. O'Dea who died March 15, 1972;

2. Leo N. O'Dea, at the time of his death, was the owner of three parcels of real estate consisting of a 40 acre tract, hereinafter referred to as Tract "A", a 120 acre Tract, hereinafter referred to as Tract "B" and a 40 acre Tract, hereinafter referred to as Tract "C";

3. Tract "A" is the Southeast Quarter of the Southeast Quarter of Section Six (6), Township Twenty (20) North, Range Two (2) East of the Third Principal Meridian, DeWitt County, Illinois; Tract "B" is a 120 acre tract being the West 120 acres of the Northwest Quarter of Section Eight (8), Township Twenty (20) North, Range Two (2) East of the Third Principal Meridian, DeWitt County, Illinois, and Tract "C" is the Southeast Quarter of the Southwest Quarter of Section Eight (8), Township Twenty (20) North, Range Two (2) East of the Third Principal Meridian, DeWitt County, Illinois;

4. Tracts "A", "B" and "C" were sold at public sale by the Administrators of the estate of Leo N. O'Dea on October 21, 1972;

5. Tract "A" was purchased at said sale by Charles J. and Doris E. Finfrock for $39,298.50 or approximately $982.46 per acre; there were not transmission line towers or improvements on Tract "A"; subsequent to said sale, Charles J. and Doris E. Finfrock conveyed Tract "A" to their son, James Lee Finfrock by deed dated February 22, 1973;

6. Tract "B" was purchased at said sale by Affiant; there was an electric transmission line supported by three 4-legged steel towers upon said Tract "B" at the time of the purchase of Tract "B" by Affiant; the transmission line came to within approximately 500 feet of the residence on Tract "B" and is still in operation; Affiant purchased Tract "B" at said sale for $123,-300 or approximately $1,027.50 per acre: Affiant stated that the presence of the transmission line and towers did not in any way reduce the amount of his bid and he would have paid no more per acre for Tract "B" if there had been no electric transmission line and no steel towers upon Tract "B"; there were two other bidders who bid on Tract "B" at the time of the sale;

7. Ivan A. Lamar was the purchaser at the sale of Tract "C"; he paid $40,600, or $1,015 per acre for Tract "C"; there were no electric transmission lines, steel towers or other improvements on Tract "A".

Further Affiant sayeth not.

s/ Frank A. Lamar

Subscribed and sworn to before me this 24th day of January, 1974.

s/ Fred W. McMillan
Notary Public